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Wikileaking the Truth about American Unaccountability for Torture

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Abstract.

Grave breaches of the Geneva Conventions are international offenses and perpetrators can be prosecuted abroad if accountability is not pursued at home. The US torture policy, instituted by the Bush administration in the context of the “war on terror” presents a contemporary example of liability for gross crimes under international law. For this reason, classification and secrecy have functioned in tandem as a shield to block public knowledge about prosecutable offenses. Keeping such information secret and publicizing deceptive official accounts that contradict the truth are essential to propaganda strategies to sustain American support or apathy about the country’s multiple current wars. Although a great deal of information and evidence has come to light about the US torture policy, there has been no thorough domestic investigation up the chain of command, no full public disclosure, and no effort to prosecute its intellectual authors in US courts. The classified diplomatic cables allegedly provided to Wikileaks by Bradley Manning have revealed one critical way in which this unaccountability has been enforced. This article addresses four issues: First, a consideration of the importance of accountability for torture and other gross violations of international law; second, a summary of efforts to hold US officials accused of torture-related offenses accountable in European courts; third, an examination of several leaked diplomatic cables that expose the lengths to which both the Bush and Obama administrations have gone to derail these foreign criminal investigations in Germany and Spain; and fourth, the unexpected consequences that leaks played in unleashing anti-authoritarian uprisings in the Arab world and the possibilities of future accountability.

Keywords

Torture, Accountability, Universal Jurisdiction, Bush, Obama

The right not to be tortured is the most universal and, arguably, the most important right that human beings have because it applies to all people everywhere under all circumstances, including in the context of war and armed conflict, and it is absolutely non-derogable (Hajjar 2009a). The right not to be tortured is a negative right, constituted through the prohibition of practices that meet the

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legal definition of torture, namely those acts of omission or commission that purposefully cause severe physical harm and/or mental suffering to people who are in custody but have not been found guilty of any crime. (The prohibition excludes the harms arising from lawful, court-ordered punishments regardless of their brutality.) Thus, the legal prohibition of torture imposes a sharp limit on the rights of states by depriving state agents and anyone acting under the color of law (e.g., government-hired contractors) of any lawful excuse to engage in or abet such prohibited practices.

Torture is in the same negative-right company with genocide and war crimes. Together, these negative rights aptly have been termed the “harder human rights” (Hagan, Schoenfeld and Palloni 2006). What distinguishes torture from violations of other harder human rights is the custodial relationship. The clarity of the custodial relationship (i.e., people are either *in custody* or they are not) and the extreme power imbalance between custodians and prisoners distinguishes the harms of torture from the conditions in which violations of the other harder human rights occur. At least in theory, people who are vulnerable to non-custodial violations can fight back, flee or surrender. Those self-preservation options are not available to people in custody.

The prohibition and criminality of torture is customary international law, which creates legal obligations to prosecute people accused of perpetrating or abetting this gross crime. When those who are accused of engaging in torture are not prosecuted and punished, their immunity or impunity makes a mockery of the law itself (see Human Rights Watch 2011). Such mockery characterizes post-9/11 decisions by US officials in the Bush administration to institute policies that disregarded the legal prohibition of torture in the interrogation and detention of suspects captured in the “war on terror,” and was compounded by disregarded obligations under federal and international law to pursue accountability, which extended to the next administration (Hajjar 2009b). President Obama has justified this failure with the facile mantra of “looking forward, not backward.” However, domestic unaccountability does not absolve perpetrators and abettors because torture is a crime that attaches universal jurisdiction, which means that perpetrators can be prosecuted in foreign national court systems if they are not prosecuted

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in the country with jurisdiction over the accused (active personality jurisdiction) or the country where the crime occurred (passive personality jurisdiction).

The doctrine of universal jurisdiction is premised on the principle that some crimes under international law—including torture—are so grave that their perpetrators are “enemies of all mankind” (*hostis humani generis*) and, therefore, that all countries have an interest in enforcing the law against them. When torture occurs in the context of war, as was the case in the US torture policy, it constitutes a grave breach of the Geneva Conventions of 1949, at minimum violations of Common Article 3, which pertains to “non-international” (i.e., not state-to-state) wars. Common Article 3 prohibits and criminalizes torture, cruel treatment, and “outrages on human dignity” of detained people who do not qualify for prisoner-of-war status. Such violations are war crimes, which attach a principle of accountability similar to universal jurisdiction because the Geneva Conventions are customary international law and impose an explicit duty on every state party—which, since the turn of the twenty-first century, includes every state in the world—to seek extradition of accused war criminals or at least to avail its courts for prosecution (*aut dedere aut judicare*).

The vast majority of war crimes committed in conflicts around the world go unpunished. Torture, for reasons noted above (i.e., the non-derogable nature of the prohibition and the clarity of the custodial relationship), lends itself more readily to the possibility of prosecution than other types of war crimes. The use of excessive force or the deliberate targeting of civilians are no less illegal but impose greater challenges to prosecution because the so-called “fog of war” makes it more difficult to ascertain and prove that those ordering or executing a military operation in which civilians are killed did so intentionally. Unintentional killing of civilians in a legitimate military operation targeting combatants is not a war crime; rather, it bears the cold label “collateral damage.” The use of indiscriminate weaponry (e.g., landmines, chemical weapons), which is a policy decision, is even harder to penalize in practice because the issue of intent lies far up the chain-of-command.

The subject of this article is the prosecutability of torture. It begins by locating analysis of accountability for gross crimes in the

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context of the jurisprudence of violence. Then it focuses on efforts to enforce international criminal law by holding US officials and state agents accountable for torture and related offenses (kidnapping and disappearance) perpetrated in the context of the “war on terror” in foreign national court systems (primarily Germany and Spain). The main focus, however, is on the political counter-efforts to thwart such accountability. Information about the latter has entered the public domain as a result of leaked, classified US State Department cables published by the anti-secrecy organization Wikileaks.

APPLYING THE JURISPRUDENCE OF VIOLENCE TO CRIMES OF STATE

The practice of human rights and much of the scholarship about that practice focuses explicitly or implicitly on “the gap problem,” namely how to close the gap between laws in the books that establish the right to rights, and law in action to enforce those rights, including sanctions for violations. Because violations of the harder human rights are gross crimes, closing the gap necessitates a prosecutorial approach to law enforcement. Redressing violations of other types of human rights that are not criminalized require other kinds of enforcement strategies (e.g., reporting and advocacy).

In regard to the enforcement of the harder human rights, scholarship and activism should incorporate a greater appreciation for the violence of law. The late Robert Cover (1995) has been credited for ushering in and laying the ground for a “jurisprudence of violence” (Sarat 2001: 9; see Minow, Ryan & Sarat 1995). He begins his essay, “Violence and the Word,” with a suggestive and often cited observation: “Legal interpretation takes place in a field of pain and death” (1995: 203). By acknowledging that law not only responds to but also metes out pain and death, Cover “achieved a crucial conceptual breakthrough, penetrating a venerable intellectual deposit that [had] nearly succeeded in completely concealing law’s violence as violence” (Sarat and Kearns 2001: 53). While Cover has been acknowledged for his intellectual insights and moral commitments, he also has been criticized by some scholars as an “apologist for law’s violence” (Sarat and Kearns 2001:50), and for exhibiting a “general satisfaction with the asymmetry of power between punishers and punished” (Simon 2001: 25). Indeed, Cover impels such readings: “If I

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have exhibited some sense of sympathy for the victims of this violence it is misleading. Very often the balance of terror in this regard is just as I would want it" (1995: 211). The "field of pain and death" to which Cover refers is the American criminal justice system in which law enforcement is shaped by enormous racial and class inequalities, and a voracious prison complex. Jonathan Simon writes: "For that reason we should not follow Cover's premature effort to 'make peace with violence'" (2001: 42). Like Simon, many progressives, including those whose intellectual and political commitments are devoted to the promotion and protection of rights, are fundamentally uncomfortable with violence, even legal violence, and wish to see themselves, their cause, and their goals as rejoinders to violence. But Cover was right: law *is* violent (in part), even if that violence is antiseptically termed "legitimate force."

Cover did not write about—or, arguably, envision—the prospects for law's violence that have developed over the last two decades as a result of post-Cold War transformations in international criminal law enforcement institutions and mechanisms (Bass 2001; Bolton 2000; Bradley and Goldsmith 1997; Hajjar 2003; Hitchens 2001; Kahn 2000; Koh 1997; Macedo 2001; Neier 1998; Robertson 1998; Roht-Arriaza 2001, 2005). Those transformations have created a new category of potential "victims of this violence": officials and agents of states, including powerful states, who are accused of perpetrating gross crimes in the context of war and conflict. One important question, with both academic and practical implications, is whether prosecuting perpetrators of gross crimes has become or will come to be regarded as legally obligatory, with an attendant diminishment of executive and military discretion.

The state of international criminal law enforcement is in flux. There is an opportunity and, I would argue, a necessity for human rights scholars to weigh in on the merits of the prosecution of state agents and others accused of gross crimes. The cases arising from efforts to prosecute American perpetrators and abettors of torture in foreign courts, as reflected in the examples below, illuminates contemporary disagreements over how and where justice should be pursued, and who decides if justice has been done. But to even contemplate the issue of justice, information about crime and criminality is a crucial ingredient.

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LEAKS AND LIES

The first indication of the largest intelligence breach in US history appeared on April 10, 2010, when Wikileaks released a classified US military video titled “Collateral Murder.” The footage shows an assault in Baghdad on July 12, 2007, shot from an Apache helicopter and accompanied by harrowing audio from a remote command center urging on the attackers with language better suited to a video game. The helicopter gunners shot up everything in the vicinity and left eleven people dead, including a Reuters photographer, his driver, and a man who had stopped his van to try to rescue one of the wounded. The audio reveals someone laughing when an armored vehicle runs over one of the corpses. When soldiers arrived on the scene and discovered two badly wounded children in Good Samaritan’s van, one can be heard saying: “Well, it’s their fault bringing their kids to a battle.”

Why was this video classified? The answer—not a good one—is that might constitute material evidence of a war crime. At minimum it authoritatively refutes the Pentagon’s explanation that people on the ground had initiated the attack (see Fromkin 2010). The video shows that only one of the men mulling in the street had a gun slung from his shoulder and what was assumed to be a grenade launcher turned out to be the photographer’s telephoto lens.

After the video went viral, a military intelligence analyst based in Baghdad named Pfc. Bradley Manning revealed himself to be the source to someone he met online named Adrian Lamo. According to their chat logs (Hansen 2011), Manning was very clear about why he leaked the video:

well, it was forwarded to WL [Wikileaks] - and god knows what happens now - hopefully worldwide discussion, debates, and reforms - if not, than [sic] we're doomed - as a species - i will officially give up on the society we have if nothing happens - the reaction to the video gave me immense hope; CNN's iReport was overwhelmed; Twitter exploded - people who saw, knew there was something wrong . . . i want people to see the truth . . . regardless of who they are . . . because without information, you cannot

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make informed decisions as a public.

Manning tipped his hand in chats to Lamo that he had leaked other materials as well, for the same reason.

hypothetical question: if you had free reign over classified networks for long periods of time... and you saw incredible things, awful things... things that belonged in the public domain, and not on some server stored in a dark room in Washington DC... what would you do?

In July 2010, Wikileaks began releasing a trove of 90,000 classified war reports from Afghanistan and Iraq. On November 28, the first batch of more than 250,000 State Department diplomatic cables started being published through a collaborative agreement between Wikileaks and major newspapers in several countries, including the *New York Times* and the *Guardian*. (Through a series of mistakes, the diplomatic cables in their unredacted entirety became available in September 2011.) On April 24, 2011, Wikileaks published Defense Department reports about past and present prisoners at Guantánamo.

After Lamo reported these chats to the FBI, Manning was arrested in May 2010 and transferred, via Kuwait, to the Marine brig at Quantico where he was held in solitary confinement for eight months and subjected to forced nudity and sensory overload. Juan Mendez, the UN Special Rapporteur on Torture, who investigated Manning's treatment in pre-trial detention, issued a report that it constituted cruel, inhumane and degrading treatment, and possibly torture (Pilkington 2012). Manning was transferred to Ft. Leavenworth in April 2011. On February 24, 2012, he was arraigned on twenty-two charged offenses under the Uniform Code of Military Justice and the draconian Espionage Act of 1917, including "aiding the enemy" (see Greenwald 2011).

One would be hard pressed to identify how any actual enemies of the US would gain *military* advantage from the "Collateral Murder" video or assessment reports of Guantánamo detainees. It is worth recalling that the *names* of those detainees who had been

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imprisoned since 2002 were classified until 2006, although that list was leaked in 2005 by a military lawyer, Matt Diaz, who opposed the government's refusal to provide this information to lawyers working on their behalf; Diaz was subsequently court-martialed (Horton 2007). The leakage of the diplomatic cables might be construed as a plausible threat if embarrassment were fatal.

The leaking of classified information is a criminal offense. But the charge of aiding the enemy—and Manning is not the only leaker so charged by the Obama administration—is revealing of the current state of enforced secrecy and official deception in the US. The incriminating contents of the “Collateral Murder” video and some of the leaked documents suggest that the “enemy” is accountability for crimes of state. Classification and secrecy have functioned in tandem as a shield to block public knowledge about prosecutable offenses in the “war on terror.” Keeping such information secret and publicizing deceptive official accounts that contradict the truth are essential to propaganda strategies to sustain public support—or public apathy—about the country's multiple wars. The war on whistleblowers, to which the harsh treatment of Manning is an extreme example, is one means of preventing such information from getting out by deterring would-be leakers (see Greene 2011; Madar 2012; Mayer 2011).

Wikileaks is by no means the only conduit for publicizing information about crimes of state in the context of the “war on terror.” Over the last decade, investigative journalists like Dana Priest, Seymour Hersh, Jane Mayer, James Risen, Charlie Savage, and Jeremy Scahill have drawn on insider sources and leaked materials to publish exposés about torture and extraordinary rendition, secret prisons, warrantless spying on citizens, assassination operations, and other illegal policies and practices. The most significant propaganda-undermining event in the “war on terror” occurred on April 28, 2004, when the leaked (albeit not classified) Abu Ghraib photos were broadcast on CBS, and Hersh (2004) published an article in *The New Yorker* about a leaked classified investigative report by Maj. Gen. Antonio Taguba which concluded that prisoner abuse in Iraq was “wanton” and “systematic.”

In response to the Abu Ghraib scandal, at first Bush administration officials employed the tactic of denial by trying to deflect chain-of-command responsibility. They blamed the shocking

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abuses on “bad apples.” As a result of political pressure for information about the government’s secret interrogation and detention policies, the first batch of “torture memos” were declassified or leaked in June 2004. Those legal memoranda and policy directives were even more shocking than the photos because they revealed official authorization at the highest levels for torture and inhumane treatment, including forced nudity, use of military dogs, hooding, stress positions and sexual humiliations (see Cole 2009; Jaffer and Singh 2007).

As a result of the flow of information about US torture into the public domain, the Bush administration’s denial strategies (see Cohen 2001) subsequently shifted from “literal denial”—we don’t torture, to “euphemistic denial”—what we do is not “torture.” Official denials were fortified by the refusal to authorize a thorough top-down investigation of the government’s interrogation and detention policies, the portrayal of critics as “terrorist sympathizers,” and a novelly expansive use of the state secrets doctrine to smother accountability-seeking litigation brought by victims in US courts.

Wikileaks, which was established in 2007, was characterized by the US Army Counterintelligence Center as an enemy organization in 2008. In a secret report (that Wikileaks got hold of and published), one of the examples of the danger that Wikileaks posed was the posting of a leaked Standard Operating Procedure manual for Guantánamo which, according to the secret report, became the “subject of a lawsuit by international human rights groups and a domestic civil rights organization requesting the release of the document under the US Freedom of Information Act.”

When Barack Obama assumed the presidency in January 2009, he cancelled the worst forms of prisoner abuse and shuttered the CIA’s black sites. But like his predecessor, he rebuffed calls for a thorough investigation of the US torture policy and refused to pursue the prosecution of its intellectual authors, contending that they had acted “in good faith.” The way in which his administration has been able to enforce the “looking forward, not backward” agenda is by preventing people from *seeing* evidence of past wrongdoing. Government classification and redaction are currently at levels unprecedented in US history, and the Obama administration has prosecuted more federal employee whistleblowers than under all

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previous US presidents combined (Greene 2011).

In this environment of enforced unaccountability, leakage in general and the materials allegedly provided by Manning in particular pose a danger—the danger of credible information—that threatens the political quiescence on which this unaccountability depends. Some of the illegal policies authorized by officials, like warrantless spying and racial profiling entrapment of citizens and residents, which became public knowledge as a result of leaks, are entirely domestic matters (i.e., not international crimes) for which there is no alternative route to accountability. However, others arising from the conduct of war that involve grave breaches of the Geneva Conventions are international offenses and therefore are potentially subject to prosecution abroad.

In the remainder of this article, I address three issues: First, a summary of efforts to hold US officials accused of torture-related offenses accountable in European courts; second, an examination of several diplomatic cables that expose the lengths to which both the Bush and Obama administrations have gone to derail these foreign criminal investigations into US torture and kidnapping, which constitutes another dimension of enforced unaccountability; and third, the unexpected consequences that Wikileaks cables played in catalyzing revolutionary uprisings across the Arab world.

EFFORTS TO PURSUE ACCOUNTABILITY FOR US TORTURE IN EUROPE

A variety of efforts have been mounted in European countries to investigate aspects of the US interrogation and detention policy and, in some countries, to criminally indict officials responsible for torture and other offenses against prisoners (see Gallagher 2009; Hajjar 2010; Hendricks 2010; Kaleck 2009; Ratner 2008). Here is a partial list:

- In 2004, a criminal complaint was introduced in Germany against Secretary of Defense Donald Rumsfeld and a number of other civilian and military officials on behalf of Iraqi victims of torture at Abu Ghraib. The case was brought in Germany for two reasons: the country has one of the most robust laws in the books for prosecuting international crimes, and the US maintains a large

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military presence in the country. Under intense US diplomatic pressure, the German prosecutor dismissed the case on the principle of subsidiarity (i.e., that a foreign court cannot assert jurisdiction for a case that is being pursued in a more appropriate venue), despite the fact that there was no criminal investigation of Rumsfeld or the others named in the complaint in the US at the time.

- In 2006, a second case was brought in Germany against Rumsfeld and several Bush administration lawyers accused of being the architects of the torture policy. The 2006 criminal complaint contained substantial new information about Rumsfeld's role in the torture of prisoners at Guantánamo, and pointed out that subsidiarity would not be an issue because there was no domestic investigation of the accused. In 2007, the prosecutor dismissed the case because none of those named in the complaint was present in the country and therefore a conviction would be unlikely.
- Following a November 2005 exposé by the *Washington Post* that the CIA engaged in kidnappings and ran black sites in Europe (subsequently revealed by Human Rights Watch to be in Poland, Romania and Lithuania), the Council of Europe conducted an investigation and in 2006 reported that a hundred people had been kidnapped on the continent. The European Parliament's investigative report, released in February 2007 and endorsed by a large majority, exposed extensive collusion by European security services and other government agencies with the CIA's extraordinary rendition program. In January 2011, a Polish prosecutor conducting a criminal investigation into the CIA black site in that country recognized that Abu Zubaydah (the first "high value detainee" taken into CIA custody in 2002) was a victim of torture. That criminal investigation is ongoing.
- In 2005, an Italian court issued indictments for twenty-six CIA agents (along with four Italian intelligence agents) who kidnapped Hassan Mustafa Osama Nasr (aka Abu Omar) in Milan in February 2003 and transported him to Egypt where he was

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brutally tortured. The CIA mission actually disrupted an Italian criminal investigation of Abu Omar. Despite US diplomatic pressure and refusal to cooperate, and political opposition by the Berlusconi government, the agents' trial-in-absentia proceeded. In November 2009, the Italian court handed down guilty verdicts for most of them. The heaviest sentence, eight years, went to the former head of the CIA's Milan station, Robert Seldon Lady, while twenty-one others got five years. Several higher ranking CIA officials, including former Rome station chief Jeffrey Castelli, were neither convicted nor acquitted because the judge ruled that their defense was stymied by the unavailability (i.e., secrecy) of information about their roles in the kidnapping and rendition. Although the Italian government refused to request the extradition of the convicted agents, the arrest warrants are active. The convicted would be at risk if they ever travel to a country with an extradition treaty with Italy, which includes all of Europe.

- On October 26, 2007, after Rumsfeld was out of office, efforts were made to indict him while he was in Paris. His movement was being tracked by non-governmental organizations and a criminal complaint had been prepared. When Rumsfeld learned of the complaint, he fled through a side door of the building where he was giving a speech to avoid lawyers and reporters waiting for him outside. The complaint was dismissed by the Parisian prosecutor in 2008 on the erroneous legal reasoning that officials have immunity for activities connected to their work; there is no legal immunity for torture.
- The British government was implicated in the torture of Binyam Mohamed, a British resident who was arrested in Pakistan in 2002 and extraordinarily rendered by the CIA to Afghanistan, then to Morocco where he was held for 18 months and brutally tortured. From Morocco he was transferred to a CIA black site near Kabul, and then to Guantánamo in 2004. The Bush administration, responding to British requests to release and repatriate Mohamed (against whom there were no credible charges), offered to do so on condition that he would remain silent about his treatment, which he refused. He was finally released and returned to Britain

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in March 2009. The public disclosures about his treatment sparked intense political controversy and led to the first criminal investigation against British intelligence agents for their collusion in CIA torture. The Obama administration threatened to suspend bilateral counter-terrorism cooperation with Britain if documents detailing Mohamed's extraordinary rendition and torture were entered into evidence as part of his suit against British officials. That effort failed: In February 2010, the High Court rejected the Labour government's appeal to keep segments of the documents classified and they were published. On November 16, 2010, the British government announced that it was paying Mohamed and five other former Guantánamo detainees millions of pounds in compensation.

- In November 2010, former President George W. Bush published his memoir, *Decision Points*. In it and in subsequent media interviews, he acknowledged (not for the first time) that he had authorized waterboarding and other so-called “enhanced” interrogation tactics that are universally regarded, at least beyond US shores, as torture. In February 2011, Bush canceled his plans to travel to Switzerland to speak at a gala benefit because a criminal complaint had been filed against him in Geneva.
- In 2007, a German court issued arrest warrants for thirteen CIA agents involved in the January 2004 kidnapping of Khaled El-Masri, a German citizen, from Macedonia. El-Masri was transported to Afghanistan where he was held incommunicado for months at the Salt Pit, a CIA black site near Kabul. When the CIA agents interrogating him realized that the arrest was a case of mistaken identity, officials up the chain-of-command ordered his release. He was dumped in a remote area of Albania and eventually was able to return to Germany. The El-Masri case is discussed in further detail in the next section because it is the subject of a leaked diplomatic cable.
- In May 2010, Spanish prosecutors issued indictments for the same thirteen CIA agents who had kidnapped El-Masri because they had transited through Spain. Another case in Spain involves

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efforts to criminally investigate six Bush administration lawyers for their role in devising the torture policy and, therefore, in abetting the torture of Spanish nationals and residents detained at Guantánamo. These cases also are discussed further below because they are the subject of three leaked diplomatic cables.

LEAKING THE POLITICS OF UNACCOUNTABILITY IN GERMANY

The Wikileaks cache of secret diplomatic cables include several pertaining to efforts to deter both the German and Spanish governments from pursuing criminal cases against US officials and agents. They illuminate and prove the lengths to which the US government under both the Bush and Obama administrations has gone to obstruct any legal accountability for the crime of torture perpetrated by Americans.

One cable dated February 6, 2007, from the US Embassy in Berlin has a subject line that reads : AL-MASRI [sic] CASE -- CHANCELLERY AWARE OF USG CONCERNS. “USG” is the acronym for US government. “CONCERNS” refers to the anxiety among officials, including Condoleezza Rice who was the National Security Advisor during El-Masri’s kidnapping and extraordinary rendition and Secretary of State when the cable was written. The “concern” referenced in that subject line was that Germany would actually enforce its own criminal laws and issue indictments.

The findings of the German investigation into El-Masri’s ordeal were publicized in that country and nurtured support for prosecution from across the political spectrum. El-Masri had been kidnapped in a snatch-and-grab operation on January 23, 2004. He was beaten, stripped naked, given an enema tranquilizer (all standard operating procedures for extraordinary renditions), and put on a ghost plane for Afghanistan. At the Salt Pit, he was deprived of food and drinkable water and, by his account, was sodomized. In February, CIA agents interrogating him decided that his German passport might be genuine, meaning that they recognized that the person they had kidnapped and were torturing was not who they thought he was—a suspected al-Qaeda member with a similar name. The passport was sent to Langley for confirmation of its authenticity. By March, CIA headquarters concluded that it was indeed genuine. But rather than

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releasing and repatriating El-Masri, the CIA continued to detain him.

In April 2004, CIA director George Tenet was informed that a German citizen was in the Salt Pit, but he did not order El-Masri's release. In May, five months after the kidnapping, Rice ordered his release. But the CIA was befuddled about how to do so without creating an international incident and exposing their secret, illegal operations. Only following a second order from Rice was he "released." But rather than being flown to Germany where his treatment would have to be publicly acknowledged, El-Masri was flown to Albania and dumped without money or papers on a remote road. The Albanian police who intercepted him eventually believed that he was German and allowed him to return home. The German investigators took note of a statement that Rice had given to the *Washington Post* that it was she who ordered El-Masri's release. That statement directly implicated her in the crime.

El-Masri's detention in CIA custody had an added element that compounded the political scandal in Germany: He had been subjected to human experimentation, shot up with psychoactive drugs repeatedly over the six months of his custody. This was proven through hair, nail and skin samples (Horton 2010).

After a criminal investigation was initiated, Secretary of State Rice and the NSA legal counsel, John Bellinger, mounted a clandestine campaign to derail the process, warning the German government of adverse repercussions if they allowed the case to proceed. That warning and the responses it elicited is the topic of the Wikileaked secret cable authored by Deputy Chief of Mission John M. Koenig. He conveyed to the State Department that in meetings with German officials he had emphasized that the issuance of international arrest warrants for high-ranking US officials would have a negative impact on the bilateral relationship. He reminded German Deputy National Security Adviser Rolf Nickel of what had happened to US-Italian relations in the wake of a similar move by Italian prosecutors the previous year. Koenig claimed that "our intention was not to threaten Germany," but by noting that the German federal government had the power to stop the judicial process, the political arm-twisting was explicit and documented.

In the cable, Koenig conveyed to his bosses that Nickel had told him there was "intense pressure from the Bundestag and the

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German media” to go forward with the case. Koenig pointed out that the US government would likewise have a difficult time in managing domestic political implications if international arrest warrants were issued. Nickel reiterated that he could not “promise that everything will turn out well.” The meaning of “well” here clearly meant the success of political collusion to thwart legal accountability for the grave abuse of a German citizen.

The German case against top US officials died as a result of that political interference. But the case against the CIA agents who kidnapped El-Masri remained alive, if stalled. Although the German government refused to seek their extradition, the arrest warrants remain valid. One of those CIA agents was designated to be sent to a new assignment in the United Kingdom, but the British government warned against that because of the German warrant.

The El-Masri case was also featured in a leaked cable from the US Embassy in Skopje, Macedonia, dated February 2, 2006. That lengthy cable discusses a range of issues including, ironically, criticisms of Macedonia’s underdeveloped commitment to the rule of law. Macedonia was the country where El-Masri’s travails began with the collusion of local security agents. The cable notes that there has been “intense press commentary here, most of it negative,” and that “opposition parties and opinion-shapers accuse the government of jeopardizing Macedonia’s [European Union] accession chances by refusing to comprehensively answer Council of Europe and European Parliament requests for a full accounting in the case.” The cable reveals that the Macedonian government is caught between a US rock and an EU-accession/public opinion hard place; it favorably notes that the government has provided “careful” responses to requests for information, such as statements that they “have little information to provide on el-Masri [sic] and his allegations.” El-Masri has brought a case against Macedonia in the European Court of Human Rights.

PINOCHET’S SHADOW

Whereas the diplomatic pressure against Germany occurred during the Bush years, similar pressure on the Spanish government transpired under the Obama administration. One investigation emanated from a US military assault on April 8, 2003, on a Baghdad hotel housing journalists that killed two, one of whom was a Spanish

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cameraman for Telecinco, José Couso; three US service members were named in a lawsuit brought by Couso's family. A second case targets the CIA agents who kidnapped El-Masri because they transited through Spain using forged documents. The most politically volatile Spanish case targets six Bush administration lawyers accused of colluding in the intellectual authorship of the US torture policy. The "Bush Six" are former White House counsel and Attorney General Alberto Gonzales, David Addington who was Vice President Dick Cheney's counsel and then chief of staff, Pentagon General Counsel William J. Haynes, Undersecretary of Defense Policy Douglas Feith, Jay Bybee who was head of the Office of Legal Counsel (OLC), and OLC Deputy Assistant Attorney General John Yoo.

Some of the details in the Bush Six case link up to larger developments in international criminal accountability since the 1990s (see Robertson 1998; Roht-Arriaza 2001). One of the Spanish investigating judges was Baltasar Garzón who played a pioneering role in developing and deploying the doctrine of universal jurisdiction to pursue people accused of gross crimes. In 1998, when former Chilean dictator Augusto Pinochet traveled to Britain, Garzón issued a warrant for his arrest and an extradition to Spain to stand trial (see Dorfman 2002; Roht-Arriaza 2005). The British Law Lords weighed the various allegations against Pinochet; these included torture and genocide. The latter was connected to rampant extra-judicial executions of people suspected of being leftist subversives by the Pinochet regime. The effort to frame such killings as genocide evinced Garzón's effort to broaden the definition of that crime to include the systematic murder of political enemies. Under the Genocide Convention of 1948, the crime is defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Political groups were purposefully excluded from the definition during in the drafting phase.

The Law Lords rejected Garzón's attempted innovation to expand the definition of genocide. They contended, moreover, that these allegations of murder are not extraditable offenses because they occurred in the context of war—the "war on communism" raging through the Southern Cone (with US support) in the 1970s. They maintained that killing enemies is a legitimate function of a state in war. Therefore, Pinochet enjoyed sovereign immunity from foreign

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prosecution for deaths that occurred during this war.

However, in a landmark decision, they determined that torture is an extraditable offense for which there is no sovereign immunity because the torture of prisoners is not a legitimate function of any state. The “Pinochet precedent” held that even a former head of state could be extradited and prosecuted for torture under the doctrine of universal jurisdiction. Pinochet managed to elude that fate when British Home Secretary Jack Straw made a political decision to allow him to return to Chile on the grounds that he was too frail to withstand trial abroad. US officials had been actively working to persuade the British government to do just that.

Nevertheless, the Pinochet precedent inspired a variety of governments, mainly in Europe, to revise their national laws to permit the prosecution of accused foreign perpetrators of gross crimes in their national legal systems. Subsequent efforts to use those new or expanded universal jurisdiction laws led to heavy political and diplomatic backlashes from countries—notably the US and Israel—whose civilian and military officials were targeted for war crimes prosecutions, and some countries, like Belgium and Britain, succumbed to foreign pressure and modified their laws to bar future cases brought by victims against officials from friendly and powerful nations. Most universal jurisdiction cases in Europe that have gone to trial have involved people from Africa and the Balkans.

In Spain, Garzón was an aggressive pursuer of all kinds of gross crimes perpetrated by states and non-state groups. He used his judicial power to open investigations into crimes alleged to have occurred in a variety of countries, including against Israeli officials accused of war crimes during the second *intifada* and the war on Gaza in 2008-09, as well as American officials in the context of the “war on terror.” It was Israeli rather than American political-diplomatic pressure that led to the 2009 narrowing of the Spanish universal jurisdiction law. However, that law reform was not retroactive, so it did not close down the investigation of the Bush Six.

FIGHTING ACCOUNTABILITY IN SPAIN

The case against the Bush Six is actually two cases. One, assigned to Judge Eloy Velasco Nuñez, arose from a complaint by a Spanish human rights organization, the Association for the Dignity of

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Spanish Prisoners, on behalf of nationals and residents who were subjected to torture and cruel, inhumane and degrading treatment at Guantánamo. The other, for which Garzón was the investigating judge, arose from the overturning of criminal convictions of four former Guantánamo detainees by the Spanish Supreme Court because the prosecution used evidence elicited through illegal interrogation methods and was therefore inadmissible. The Supreme Court ordered a more detailed investigation into their claims of torture.

Three Wikileaked cables from the US Embassy in Madrid, dated April 1, April 17 and May 5, 2009, reveal the Obama administration's efforts to thwart these investigations, and the willingness of Spanish political officials to collude in that effort. The April 1 cable's subject line reads SPAIN: PROSECUTOR WEIGHS GTMO CRIMINAL CASE VS. FORMER USG OFFICIALS. The summary states that the Spanish organization that filed the complaint "is attempting to have the case heard by Investigating Judge Baltasar Garzón, internationally known for his dogged pursuit of 'universal jurisdiction' cases." Garzón had passed the file on the Bush Six to Chief Prosecutor Javier Zaragoza to determine if there is a legitimate case. According to the cable, Zaragoza "told us that in all likelihood he would have no option but to open a case." At the time of the meeting with Zaragoza, the cable states, "the evidence was on his desk in four red folders a foot tall."

Zaragoza is described as appearing "visibly displeased" to have to deal with this matter and assured US officials that he would argue against the case being assigned to Garzón. Although Garzón had "first right of refusal," Zaragoza would try to get the case assigned to Judge Ismael Moreno instead, because he is investigating the "illegal 'CIA flights' that have transited Spain carrying detainees to Guantánamo." Zaragoza reportedly added that "Garzón's impartiality was very suspect, given his public criticism of Guantánamo and the U.S. war on terror...and his August 2008 public statements that former President Bush should be tried for war crimes." The one sure way that Spain could dismiss the Bush Six case, according to Zaragoza, would be for the US to open its own credible investigation of the accused.

The final paragraph in the April 1 cable, titled "Comment," articulates official accountability anxiety quite clearly: "The fact that

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this complaint targets former Administration legal officials may reflect a ‘stepping-stone’ strategy designed to pave the way for complaints against even more senior officials.” The cable conveys suspicion (accurate) that American lawyers and organizations like Human Rights Watch and Reprieve (UK) may have been involved because the complaint “appears to have been drafted by someone who understands the U.S. legal system far better than the average Spanish lawyer.” And finally, “the timing could not be worse for President Zapatero as he tries to improve ties with the U.S. and get the Spanish public focused on the future of the relationship rather than the past. That said, we do not know if the government would be willing to take the risky step of trying behind the scenes to influence the prosecutor’s recommendation on this case or what their reaction to such a request would be.”

Over the following two weeks, according to the April 17 cable, a concerted campaign of INTENSIVE USG OUTREACH was waged. The Obama administration sent Senators Mel Martinez (R-FL) and Judd Gregg (R-NH) to lobby Spanish officials to dispose of this case. Martinez’s mission, according to the cable, was to underscore “that the prosecutions would not be understood or accepted in the US and would have an enormous impact on the bilateral relationship.” The outcome of this campaign appeared tentatively successful, as expressed in the cable’s subject line: SPAIN: ATTORNEY GENERAL RECOMMENDS COURT NOT PURSUE GTMO CRIMINAL CASE VS. FORMER USG OFFICIALS.

On April 16, Spanish Attorney General Candido Conde Pumpido had announced that he would not support this criminal complaint because it is “‘fraudulent,’ and has been filed as a political statement to attack past USG policies.” According to the cable, his legal reasoning was that a complaint targeting US “advisers” could not be pursued in light of the fact that an earlier Spanish case (unexplained in the cable) against Rumsfeld “had failed.” Like Zaragoza’s comments documented in the previous cable, Conde Pumpido said that “if there is evidence of criminal activity by USG officials, then a case should be filed in the United States.” But, the cable notes, he said that it would still be up to investigating judge Garzón whether to pursue the case or not and that governmental opposition alone could not derail it.

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The following day (April 17), Garzón bowed to the arguments of Spanish prosecutors to have the case reassigned and he forwarded it to National Court docketing authorities, who turned it over to Judge Velasco. Although unmentioned in the cable, on May 4, Velasco submitted an International Rogatory Letter to US Attorney General Eric Holder asking for confirmation about “whether the facts to which the complaint makes reference are or not now being investigated or prosecuted.”

On April 29, Garzón announced that he was opening a new investigation into alleged US torture at Guantánamo, although he did not name any individual targets. The embarrassment and exclusion of Garzón was the busywork of Spanish and American officials over the following three weeks, according to the cable dated May 5. Embassy officials met with Zaragoza on May 4 to discuss Garzón’s latest move. Zaragoza said he had “directly and personally” asked Garzón if he had announced a new investigation “to drum up more speaking fees... Zaragoza opined that Garzón, having gotten his headline, would soon drop the matter.” From there, the cable proceeds to describe Zaragoza’s “strategy to force [Garzón’s] hand” if he does not drop the case. Paradoxically, Zaragoza’s strategy aimed to use one accountability-seeking case in Spain to derail Garzón’s new investigation: It hinged on the fact that Garzón had ordered Spanish police to visit Spanish detainees at Guantánamo in 2004. Zaragoza reasoned that Garzón could be embarrassed into dropping the case because he had appeared to condone the means by which the evidence had been gathered that Spain subsequently used to prosecute four former Guantánamo detainees, whose conviction was overturned by the Supreme Court.

Zaragoza elaborated on his hand-forcing strategy: The police officers Garzón had sent to Guantánamo were scheduled to testify before Judge Moreno on the CIA flight case, and “Zaragoza hopes their testimony will put on record Garzón’s role in the earlier cases.” More ominously and, as it has turned out, presciently, Zaragoza was also “banking on the fact that Garzón is already in hot water over his excessive zeal in another case.” What he was referring to was the fact that Garzón had garnered the wrath of Spanish fascists by opening an investigation into Franco-era crimes when he ordered the exhumation of nineteen mass graves in 2008. For disregarding the country’s

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amnesty law that had closed the book on crimes of that era (despite that he was not seeking criminal indictments), he was accused of exceeding his judicial authority and was suspended. In September 2010, the Supreme Court endorsed a lower court's ruling that Garzón should be tried.

The May 5 cable concludes with a summing up of where the Bush Six case stood at the time. It notes that Zaragoza

is acting in good faith and playing a constructive role...Nevertheless, we do not share his optimism that this problem will go away anytime soon. Having started, it is hard for us to see why the publicity-loving Garzón would shut off his headline-generating machine unless forced to do so... We also fear Garzón -- far from being deterred by threats of disciplinary action -- may welcome the chance for martyrdom, knowing the case will attract worldwide attention. In any event, we will probably be dealing with this issue for some time to come.

These three cables were published in *El País* on November 29, 2010, the day after they were released by Wikileaks. They immediately elicited an outcry in Spain over their officials' collusion with US officials to thwart criminal investigations (see *Democracy Now* 2010). On December 14, the New York City-based Center for Constitutional Rights and the Berlin-based European Center for Human Rights (2010), which had been assisting the Spanish lawyers who made the complaint, submitted an expert opinion to the Spanish National Court advising of additional information about the US torture program that had come to light and, referencing the cables themselves, efforts by the US to interfere politically with the Spanish legal process. The following day Velasco issued an order to the prosecution asking for its views on whether the case should proceed or by which date the US should respond to the still-unanswered questions in the Letter Rogatory.

AMERICA'S UNACCOUNTABLE RESPONSE

The Wikileaks cables about secretive diplomatic

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interventions in the Spanish legal process contributed both directly and indirectly to public knowledge about the status of torture accountability in the US. On January 28, 2011, Velasco issued an order that set March 1 as the deadline for the US response to his questions. On exactly that date the US Justice Department sent a letter authored by Mary Ellen Warlow in the Criminal Division's Office of International Affairs. Velasco subsequently issued a ruling in which he "temporarily stayed" the case in Spain.

The Justice Department letter to Velasco is a succinct and disturbing summary of how the US government has dealt with well-substantiated evidence of the systematic and pervasive torture of prisoners in the "war on terror." The letter claims that the "government of the United States, in various fora, has undertaken numerous actions relating both to 1) the alleged mistreatment of detainees at issue in the [Spanish] complaint; and 2) legal advice provided in relation to the detainees." The letter then proceeds to describe these actions.

In regard to the issue of legal advice, the letter explains that the Justice Department's Office of Professional Responsibility (OPR) is the authority for investigating alleged misconduct by Justice Department lawyers. The letter states that OPR conducted an investigation into the activities of Bybee and Yoo, who had authored some of the most significant memos relating to the interrogation of detainees, including two dated August 1, 2002, one of which narrowed the definition of physical torture to exclude anything less than "the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and the second that sanctioned tactics, including waterboarding, already in use by the CIA. The blithe description of that investigation and its outcome misrepresents the actual story, which is a sordid and politicized effort to enforce unaccountability.

The OPR investigation was completed but not released under President Bush, and was withheld from the public (without explanation) until February 2010 (see US Department of Justice 2009). When it was finally released, as astute observers had expected, the OPR report contained substantial evidence that OLC lawyers had colluded with the White House to "legalize" unlawful tactics. The authors of the draft OPR report concluded that this constituted

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“professional misconduct,” which could have led to disbarment proceedings. In the case of Bybee, it could have led to his impeachment from the bench of the Ninth Circuit where he currently sits. But instead of allowing that honest and accurate conclusion to be adopted in the final report, Attorney General Holder authorized David Margolis, a career Justice Department official, to make the final determination. Margolis decided that the lawyers whose work had been investigated had merely exercised “poor judgment.”

According to the Justice Department letter responding to Velasco’s questions, in light of Margolis’s conclusion, “there exists no basis for criminal prosecution of Yoo or Bybee.” This conclusion was used by the government to also assert, as stated in the letter, that “the Department of Justice has concluded that it is not appropriate to bring criminal cases with respect to any other executive branch officials, including those named in the complaint [i.e., Gonzales, Addington, Feith, and Haynes], who acted in reliance on these and related OLC memoranda with respect to their involvement with the policies and procedures for detention and interrogation.”

In regard to other allegations of detainee mistreatment and domestic accountability measures not specific to the Spanish complaint, the letter cites two successful prosecutions in federal court (David Passaro, a CIA contractor convicted for brutally assaulting a detainee in Afghanistan in 2003, and Don Ayala, a private contractor in Afghanistan who was convicted of voluntary manslaughter for the death of a detainee whom “he and US soldiers had detained”). The letter then proclaims that the “breadth of investigative actions” “show that there are effective judicial processes under U.S. law for addressing violations.”

As a matter of fact, aside from court martial proceedings or administrative sanctions against approximately 100 soldiers, the Justice Department never pursued any criminal “investigative actions” involving those up the chain-of-command. Moreover, in every single civil lawsuit brought by victims of US torture against civilian or military officials or private corporations, the government mobilized an expansive interpretation of the state secrets doctrine to shut them down. Not a single official was ever held civilly liable in a US court, and this was the direct result of the Justice Department’s successful efforts to persuade judges that such cases are non-justiciable.

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The only area of criminal conduct that the Obama administration authorized for investigation involved individual CIA agents who might have “exceeded” the legal advice provided by OLC lawyers. Mock execution was the one practice deemed to fall beyond the pale of that advice. Assistant US Attorney John Durham was tasked to investigate possible excesses as well as the CIA’s destruction of videotapes of several detainees (which recorded their waterboarding and other forms of violent abuse). In November 2010, as the letter responding to Velasco states, Durham concluded that “it was not appropriate to bring criminal charges with regard to the actual destruction of the tapes.” The letter adds that Durham and his team’s investigation into whether federal laws were violated in connection with the interrogation of specific detainees is “ongoing, and its details remain confidential.” Since then, Durham decided that the CIA agents who exceeded the OLC guidelines should not be prosecuted (see Human Rights Watch 2011).

UNEXPECTED CONSEQUENCES

The regime of secrecy, deception and unaccountability for torture and other illegal actions by the US government was apparently a factor in Bradley Manning’s decision to leak the largest trove of classified materials in US history. On the diplomatic cables specifically, Manning described their contents to Lamo as:

crazy, almost criminal political
backdealings... the non-PR-versions of world events
and crises... its important that it gets out... i feel, for
some bizarre reason... it might actually change
something...

Manning will probably be convicted and face life in prison. But the leakage for which he stands accused changed more than a mere “something.” A leaked diplomatic cable from the Tunisian Embassy was one catalyst in the December 2010 revolution in that country that led, over a matter of days, to the end of the corrupt and authoritarian regime of Zine Ben Ali. The Tunisian revolution sparked the Egyptian revolution that started in earnest on January 25, 2011. And the inspiration of sustained protests demanding the end of the

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regime of Hosni Mubarak set off the revolutionary events across the region that have been described as the “Arab Spring.”

In a last ditch effort to hang onto power in the face of massive, countrywide unrest, on January 29 Mubarak named Omar Suleiman, head of Egypt’s General Intelligence Service (GIS), to fill the long-vacant vice presidency. Suleiman’s promotion had been predicted in a leaked cable with the title “Presidential Succession in Egypt” dated May 14, 2007. Appointing Suleiman was a shrewd (but ultimately unsuccessful) move because he was a favorite of Washington, and Mubarak clearly hoped that this would motivate the US to back his regime against revolutionary demands for his departure.

In the mid-1990s, Suleiman worked closely with the Clinton administration in devising and implementing the rendition program. Back then, rendition involved kidnapping suspected terrorists and transferring them to their home or a third country for trial. In *The Dark Side*, Jane Mayer (2008: 113) describes how the rendition program began during the Clinton years:

Each rendition was authorized at the very top levels of both governments [the US and Egypt]....The long-serving chief of the Egyptian central intelligence agency, Omar Suleiman, negotiated directly with top [CIA] officials. [Former US Ambassador to Egypt Edward] Walker described the Egyptian counterpart, Suleiman, as “very bright, very realistic,” adding that he was cognizant that there was a downside to “some of the negative things that the Egyptians engaged in, of torture and so on. But he was not squeamish, by the way.”

Mayer adds:

Technically, US law required the CIA to seek “assurances” from Egypt that rendered suspects wouldn’t face torture. But under Suleiman’s reign at the EGIS, such assurances were considered close to worthless. As Michael Scheuer, a former CIA officer [head of the al-Qaeda desk] who helped set up the

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practice of rendition, later testified, even if such “assurances” were written in indelible ink, “they weren't worth a bucket of warm spit.”

When renditions got “extraordinary” during the Bush administration, Egypt was a favorite destination to send detainees for torture-by-proxy. One person extraordinarily rendered there was Egyptian-born Australian citizen Mamdouh Habib. As Habib (2009) recounts in his memoir, *My Story: The Tale of a Terrorist Who Wasn't*, he was repeatedly subjected to electric shocks, immersed in water up to his nostrils, beaten, had his fingers broken, and was hung from metal hooks. At one point, his interrogator slapped him so hard that his blindfold was dislodged, revealing the identity of his tormentor: Suleiman. Frustrated that Habib was not providing useful information or confessing to involvement in terrorism, Suleiman ordered a guard to murder a shackled Turkistani prisoner in front of Habib, which he did with a vicious karate kick. In April 2002, after five months in Egypt, Habib was rendered to American custody at Bagram prison in Afghanistan, and then transported to Guantánamo. The day before he was scheduled to be charged by the military commissions, Dana Priest and Dan Eggen (2005) published a *Washington Post* exposé about Habib's torture. The US government immediately announced that he would not be charged and repatriated him home to Australia.

A far more infamous torture case in which Suleiman also is directly implicated is that of Ibn al-Sheikh al-Libi, an alleged trainer at al-Khaldan camp in Afghanistan. After he was captured by the Pakistanis while fleeing across the border in November 2001, al-Libi was sent to Bagram, then to a CIA black site on the USS Bataan in the Arabian Sea, then extraordinarily rendered to Egypt. Al-Libi confessed knowledge about a connection between al-Qaeda and the Iraqi regime of Saddam Hussein. In early 2003, this was exactly the kind of information that the Bush administration was seeking to justify a “pre-emptive” attack on Iraq and to persuade reluctant allies to go along. Indeed, al-Libi's “confession” was one the central pieces of “evidence” presented at the United Nations by Secretary of State Colin Powell to make the case for war. However, that confession was a lie tortured out of al-Libi by the Egyptians under Suleiman's supervision. CIA chief Tenet (2007: 353-354) provides his account of

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the al-Libi situation in his memoir, *At the Center of the Storm*:

We believed that al-Libi was withholding critical threat information at the time, so we transferred him to a third country for further debriefing. Allegations were made that we did so knowing that he would be tortured, but this is false. The country in question [Egypt] understood and agreed that they would hold al-Libi for a limited period. In the course of questioning while he was in U.S. custody in Afghanistan, al-Libi made initial references to possible al-Qa'ida [sic] training in Iraq. Then, shortly after the Iraq war got under way, al-Libi recanted his story. Now, suddenly, he was saying that there was no such cooperative training...He clearly lied. We just don't know when. Did he lie when he first said that al-Qa'ida [sic] members received training in Iraq or did he lie when he said they did not? In my mind, either case might still be true...The fact is, we don't know which story is true, and since we don't know, we can assume nothing.

The use of al-Libi's statement in the build up to the Iraq war and the subsequent revelation that he had recanted made him a huge potential liability for the US. Al-Libi's whereabouts were unknown until April 2009 when HRW researchers doing an investigation about the treatment of prisoners in Libya encountered him in the courtyard of a prison in Tripoli. This prompted efforts by HRW to gain access to al-Libi in order to question him about his experience. Two weeks later, on May 10, al-Libi was dead, and the Qaddafi regime claimed it was a "suicide" (Hajjar 2011). According to Evan Kohlmann (2009), "Al-Libi's death coincided with the first visit by Egypt's spymaster Omar Suleiman to Tripoli...By the time Omar Suleiman's plane left Tripoli, Ibn al-Sheikh al-Libi had committed 'suicide.'"

Several days after Suleiman was appointed vice president, the Mubarak regime collapsed and was replaced by a military junta operating under the title of the Supreme Council of the Armed Forces (SCAF). On September 8, 2011, after the dictatorial Libyan regime of

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Muammar al-Qaddafi had been routed from the capital city as a result of the NATO-assisted revolution in that country, investigators started combing the files in the office of the country's security chief Moussa Koussa. They found numerous cables from the CIA and Britain's MI6 detailing Libya's cooperative role in the extraordinary rendition program.

After Mubarak fell, Egyptian protesters expressed their loathing of the torture and police abuse that had been mainstays of the regime for so long. Jails and prisons across the country were attacked, in some places still containing the devices of torture. When protesters seized the offices of the GIS, the Ministry of Interior and other security centers, they found tons of recently shredded documents presumably including information about Egypt's role in the US torture program. The reason for this presumption is that the shredded tonnage did not include vast amounts of domestic police files on Egyptians who had been imprisoned. Anti-torture activists have speculated that in those hours as the regime collapsed, the CIA urged counterparts in Egypt to destroy evidence that may be used for future accountability-seeking initiatives in Egypt and elsewhere. However, human rights lawyers had plans to pursue the prosecution of Suleiman, including for his role in assisting US torture using evidence contained in documents found in Libya as well as ones in Egypt that escaped the shredder. Suleiman avoided that prospect by dying

CONCLUSION

The rampancy and details of US torture became known to Americans and the world against the will of government officials who strived keep this information hidden. Because torture is a crime, the lengths to which the government has gone to keep still-undisclosed information secret, and to resist accountability at home and abroad is an ongoing criminal enterprise. As the leaked diplomatic cables indicate, public opinion in Europe has been broadly supportive of criminal accountability for US torturers, even though—or in the case of Spain, because—criminal complaints have been killed or suspended through back channel tampering. While, at present, enforced unaccountability has prevailed to keep US officials out of the docks of foreign courts, new revelations about the torture program continue to

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come to light, including recently uncovered communiqués between the CIA and now-deposed Arab dictators. The future consequences and uses of that information may not be so easily managed through government-to-government political arm twisting.

There is no legal immunity or any statute of limitations for the gross crime of torture. Recent developments in Latin America are suggestive of the possibility of future accountability. Many of the region's military regimes that had perpetrated mass torture (as well as extra-judicial executions) granted themselves immunity as they vacated power. Their impunity was supported or accepted at the time by large sectors of those societies who wanted to "look forward, not backward." But the passage of time and changing political environments brought forth a legal reckoning as some of those aging torturers were put on trial and convicted (see Lutz and Reiger 2009). However belated, these prosecutions have served to transform the conditions in which impunity previously had thrived and have added new and redeeming chapters to those nations' histories. The record of authoritarian-era struggles by lawyers and human rights activists that bore little fruit at the time became a critical factor in recent quests for justice and accountability.

The history of this era is defined both by torture and by transnational efforts to stop and punish it. Ultimately, even failed attempts to pursue accountability for those responsible for US torture leave a noble record of efforts to enforce the law and validate the norms and rules that were so flagrantly violated. These initiatives will be important in the future, perhaps even more than at present, as a record of resistance to inhumanity and dehumanization. Moreover, as any good student of "law in action" knows, the impact of legal initiatives cannot be assessed definitively by the immediate outcomes of cases.

These efforts to hold US officials accountable are better understood because of the leaked cables that reveal the lengths to which the government has gone to thwart them. Or, to put it another way, were it not for the leakage, we would know far less about the disgraceful record of enforced unaccountability. It is not hard to predict who, in the future, will be remembered for being on the right side of history.

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References

- Bass, Gary. 2001. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton: Princeton University Press.
- Bolton, John. 2000. "Is There Really 'Law' in International Affairs?" *Transnational Law and Contemporary Problems* 10: 1-48.
- Bradley, Curtis A. and Jack L. Goldsmith. 1997. "The Current Illegitimacy of International Human Rights Litigation." *Fordham Law Review* 66: 319-369.
- Bush, George W. 2010. *Decision Points*. New York: Crown.
- Center for Constitutional Rights and European Center for Human Rights. 2010. "Leading Human Rights Groups Urge Spanish Court to Open Investigation into Bush Lawyers in GTMO Torture," December 14. Retrieved September 28, 2011 (<http://ccrjustice.org/newsroom/press-releases/leading-rights-groups-urge-spanish-court-open-investigation-bush-lawyers-gtm>).
- Cohen, Stanley. 2001. *States of Denial: Knowing about Atrocities and Suffering*. New York: Polity.
- Cole, David. 2009. *Torture Memos: Rationalizing the Unthinkable*. New York: New Press.
- Cover, Robert. 1995. 'Violence and the Word.' Pp. 203-238 in *Narrative, Violence and the Law: The Essays of Robert Cover*, edited by Martha Minow, Michael Ryan & Austin Sarat. Ann Arbor, MI: University of Michigan Press.
- Democracy Now. 2010. "Leaked Cables Reveal U.S. Pressured Spain to Drop Case of Cameraman Killed in 2003 Attack on Journalists in Baghdad," December 1. Retrieved September 28, 2011 (http://www.democracynow.org/2010/12/1/us_pressured_spain_to_drop_case).
- Dorfman, Ariel. 2002. *Exorcising Terror: The Incredible Unending Trial of Augusto Pinochet*. New York: Seven Stories Press.
- Fromkin, Dan. 2010. "WikiLeaks VIDEO Exposes 2007 'Collateral Murder' in Iraq," *Huffington Post*, May 5. Retrieved September 28, 2011 (http://www.huffingtonpost.com/2010/04/05/wikileaks-exposes-video-o_n_525569.html).
- Gallagher, Katherine. 2009. "Universal Jurisdiction in Practice: Efforts To Hold Donald Rumsfeld and Other High Level United States Officials Accountable for Torture," *Journal of International Criminal Law* 7: 1087-1116.
- Greene, Linda. 2011. "Obama's War on Whistleblowers," *Counterpunch*, June 30. Retrieved September 28, 2011 (<http://www.counterpunch.org/2011/06/30/obama-s-war-on-whistleblowers/>).
- Greenwald, Glenn. 2011. "Manning Could Face Death: For What?" *Salon*, March 3. Retrieved September 28, 2011 (http://www.salon.com/news/opinion/glenn_greenwald/2011/03/03/manning).
- Habib, Mamdouh. 2009. *My Story: The Tale of a Terrorist Who Wasn't*. Sydney, Australia: Scribe Publications Pty Ltd.
- Hagan, John, Heather Schoenfeld, and Alberto Palloni. 2006. "The Science of Human Rights, War Crimes, and Humanitarian Emergencies," *Annual Review of Sociology* 32: 329-349.
- Hajjar, Lisa. 2003. "Chaos as Utopia: International Criminal Prosecutions as a Challenge to State Power." *Studies in Law, Politics and Society* 31: 3-23.

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© *Sociologists Without Borders/Sociólogos Sin Fronteras*, 2012

L. Hajjar / Societies Without Borders 7:2 (2012) 192-225

- Hajjar, Lisa. 2009a. "Rights at Risk: Why the Right Not To Be Tortured Is Important to You," *Studies in Law, Politics and Society* 48: 93-120.
- Hajjar, Lisa. 2009b. "Does Torture Work? A Socio-legal Assessment of the Practice in Historical and Global Perspective." *Annual Review of Law and Social Science* 5: 311-345.
- Hajjar, Lisa. 2010. "Universal Jurisdiction as Praxis: An Option To Pursue Legal Accountability for Superpower Torturers." Pp. 87-120 in *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration*, edited by Austin Sarat and Nasser Hussein. New York: New York University Press.
- Hajjar, Lisa. 2011. "Omar Suleiman, the CIA's Man in Cairo and Egypt's Torturer-in-Chief." *Jadaliyya*, January 30, 2011. Reprinted in *Al Jazeera English*.
- Hansen, Eric. 2011. "Manning-Lamo Chat Logs Revealed," *Wired*, July 13. Retrieved September 28, 2011 (<http://www.wired.com/threatlevel/2011/07/manning-lamo-logs>).
- Hendricks, Steve. 2010. *A Kidnapping in Milan: The CIA on Trial*. New York: W.W. Norton.
- Hersh, Seymour. 2004. "Torture at Abu Ghraib," *The New Yorker*, May 4; available at: http://www.newyorker.com/archive/2004/05/10/040510fa_fact.
- Hitchens, Christopher. 2001. *The Trial of Henry Kissinger*. New York: Verso.
- Horton, Scott. 2007. "The Persecution of Lt. Cmdr. Matthew Diaz," *Harpers*, May 14. Retrieved September 28, 2011 (<http://harpers.org/archive/2007/05/hbc-90000071>).
- Horton, Scott. 2010. "The El-Masri Cable," *Harpers*, November 29. Retrieved September 28, 2011 (<http://harpers.org/archive/2010/11/hbc-90007831>).
- Human Rights Watch. 2011. *Getting Away with Torture: The Bush Administration and the Mistreatment of Detainees*. New York, July 11. Retrieved September 28, 2011 (<http://www.hrw.org/reports/2011/07/12/getting-away-torture-0>).
- Jaffer, Jameel and Amrit Singh. 2007. *The Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond*. New York: Columbia University Press.
- Kahn, Paul. 2000. "American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order." *Chicago Journal of International Law* 1: 1-18.
- Koh, Harold Hongju. 1997. "Why Do Nations Obey International Law?" *Yale Law Journal* 106: 2599-2659.
- Kaleck, Wolfgang. 2009. "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe, 1998-2008," *Michigan Journal of International Law* 30: 927-980.
- Kohlmann, Evan. 2009. Ibn al-Sheikh al-Libi October 2009. The NEFA Foundation. Retrieved September 28, 2011 (http://www.nefafoundation.org/miscellaneous/FeaturedDocs/Nefa_IbnalSheikhLibi.pdf).
- Lutz, Ellen and Caitlin Reiger, eds. 2009. *Prosecuting Heads of State*. New York: Cambridge University Press.
- Macedo, Stephen, ed. 2001. *The Princeton Principles on Universal Jurisdiction*. Princeton, NJ: Princeton University Program in Law and Public Affairs.
- Madar, Chase. 2012. *The Passion of Bradley Manning: The Story of the Suspect Behind the Largest Security Breach in US History*. New York: Or Books.

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© Sociologists Without Borders / Sociólogos Sin Fronteras, 2012

L. Hajjar/Societies Without Borders 7:2 (2012) 192-225

- Mayer, Jane. 2008. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Doubleday.
- Mayer, Jane. 2011. "The Secret Sharer: Is Thomas Drake an Enemy of the State?" *The New Yorker*, May 23. Retrieved October 10, 2011 (http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer?currentPage=all).
- Minow, Martha, Michael Ryan & Austin Sarat, eds. 1995. *Narrative, Violence and the Law: The Essays of Robert Cover*. Ann Arbor, MI: University of Michigan Press.
- Neier, Aryeh. 1998. *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*. New York: Times Books, Random House.
- Pilkington, Ed. 2012. "Bradley Manning's Treatment Was Cruel and Inhuman, UN Torture Chief Rules." *The Guardian*, March 12.
- Priest, Dana and Dan Eggen. 2005. "Terror Suspect Alleges Torture: Detainee Says U.S. Sent Him to Egypt before Guantanamo," *Washington Post*, January 6. Retrieved September 28, 2011 (<http://www.washingtonpost.com/wp-dyn/articles/A51726-2005Jan5.html>).
- Ratner, Michael. 2008. *The Trial of Donald Rumsfeld: A Prosecution by the Book*. New York: New Press.
- Robertson, Geoffrey. 1998. *Crimes against Humanity: The Struggle for Global Justice*. New York: New Press.
- Roht-Arriaza, Naomi. 2001. "The Pinochet Precedent and Universal Jurisdiction." *New England Law Review* 35: 311-319.
- Roht-Arriaza, Naomi. 2005. *The Pinochet Effect: Transitional Justice in the Age of Human Rights*. Philadelphia: University of Pennsylvania Press.
- Sarat, Austin. 2001. 'Situating Law between the Realities of Violence and the Claims of Justice: An Introduction.' Pp. 3-16 in *Law, Violence, and the Possibility of Justice*, edited by Austin Sarat. Princeton, NJ: Princeton University Press.
- Sarat, Austin and Thomas Kearns. 2001. 'Making Peace with Violence: Robert Cover on Law and Legal Theory.' Pp. 49-84 in *Law, Violence, and the Possibility of Justice*, edited by Austin Sarat. Princeton, NJ: Princeton University Press.
- Simon, Jonathan. 2001. "The Vicissitudes of Law's Violence," in *Law, Violence, and the Possibility of Justice*, ed. Austin Sarat. Princeton, NJ: Princeton University Press, pp. 17-48.
- Tenet, George. 2007. *At the Center of the Storm: My Years at the CIA*. New York: Harper Collins.
- US Army Counterintelligence Center. 2008. Wikileaks.org—An Online Reference to Foreign Intelligence Services, Insurgents, or Terrorist Groups? Retrieved September 28, 2011 (<http://mirror.wikileaks.info/leak/us-intel-wikileaks.pdf>).
- US Department of Justice, Office of Professional Responsibility. 2009. Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists. Washington, DC. Retrieved September 28, 2011 (<http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>).

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© *Sociologists Without Borders/Sociólogos Sin Fronteras*, 2012

L. Hajjar / Societies Without Borders 7:2 (2012) 192-225

- US Embassy in Berlin. 2007. "AL-MASRI CASE -- CHANCELLERY AWARE OF
USG CONCERNS," February 6. Retrieved September 28, 2011 ([http://
cablesearch.org/cable/view.php?id=07BERLIN242](http://cablesearch.org/cable/view.php?id=07BERLIN242)).
- US Embassy in Madrid. 2009A. 09MADRID347 "Spain: Prosecutor Weighs GTMO
Criminal Case vs. Former USG [U.S. Government] Officials," April 1.
Retrieved September 28, 2011 ([http://ccrjustice.org/wikileaks-cable-
09madrid347](http://ccrjustice.org/wikileaks-cable-09madrid347)).
- US Embassy in Madrid. 2009B. 09MADRID392 "Spain: Attorney General
Recommends Court Not Pursue GTMO Criminal Case vs Former USG
[U.S. Government] Officials," April 17. Retrieved September 28, 2011
(<http://ccrjustice.org/wikileaks-ccr-analysis-of-cable-09madrid392>).
- US Embassy in Madrid. 2009C. 09MADRID440 "Garzón Opens Second
Investigation Into Alleged U.S. Torture of Terrorism Detainees," May 5.
Retrieved September 28, 2011 ([http://ccrjustice.org/wikileaks-ccr-analysis-
of-cable-09madrid440](http://ccrjustice.org/wikileaks-ccr-analysis-of-cable-09madrid440)).
- US Embassy in Skopje. 2007. 06SKOPJE118, MACEDONIA: PRIME MINISTER
ON ELECTIONS, NATO, February 6. Retrieved September 28, 2011
(<http://wikileaks.org/cable/2006/02/06SKOPJE118.html>).
- Wikileaks. 2010. "Collateral Murder" (video). Retrieved September 28, 2011 ([http://
www.collateralmurder.com/](http://www.collateralmurder.com/)).

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